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No. 93-2012

In the Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE CHRISTIAN CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Magistrates Act authorized a district judge to assign a magistrate judge to preside while a court reporter read back trial testimony to the jury during jury deliberations.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 27-40) is reported at 18 F.3d 738.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1994. The petition for a writ of certiorari was filed on May 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d), and use of a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) (1988 & Supp. IV 1992). He was sentenced to 106 months' imprisonment, to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 27-40.

1. On February 24, 1992, at approximately 2:30 p.m., petitioner entered the Great Western Bank at 5392 Walnut Avenue in Irvine, California. He was wearing a Ronald Reagan mask, and he carried a handgun and what appeared to be a hand grenade. Petitioner raised the grenade and said, "This is a hold up. Don't push any buttons. I have a hand grenade." He then took $15,950 from three tellers and left the bank. Petitioner drove away from the bank in an automobile registered to his wife. Gov't C.A. Br. 3-6.[1]

2. During deliberations at petitioner's trial, the jury requested that the testimony of Ernest Barragan be read back to it. Barragan had testified that he observed petitioner leave the bank in a Mercedes Benz bearing a license plate registered to petitioner's wife. Pet. App. 32-33; Gov't C.A. Br. 5, 17. At the time that the jury made the request, the district judge who presided over petitioner's trial had traveled to the District of Alaska to preside over another case. After learning of the jury's request by telephone, the district judge decided to allow the reading of the testimony. Gov't C.A. Br. 17; 6/1/92

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[1] Petitioner also was charged with the robberies of the Orange County National Bank on December 23, 1991, and the Hawthorne Savings and Loan on December 3, 1991. The jury failed to reach a verdict on those counts. Gov't C.A. Br. 7-15.

Tr. 5-6. In an effort to find a judge to sit in on the reading of the testimony, the presiding judge's clerk contacted approximately nine other district judges in the Central District of California, but each was unavailable. 6/1/92 Tr. 7-8. The district judge then delegated the task to a federal magistrate judge pursuant to 28 U.S.C. 636(b)(3).

Petitioner objected solely on the basis of "uncertainty in the law about whether or not a magistrate can preside over this portion of the proceedings." 6/1/92 Tr. 9. Petitioner did not identify any possible prejudice resulting from the magistrate judge's presence during the reading of Barragan's testimony, nor did he identify any statutory or constitutional obstacle to the procedure independent of the Federal Magistrates Act itself. *Ibid.* The magistrate judge sat at the bench and observed while the court reporter read Barragan's testimony to the jury. The magistrate judge did not utter a word in the jury's presence and made no rulings. There is no indication in the record that the jury was aware that the person present was a magistrate judge rather than a federal district judge. Pet. App. 33; 6/1/92 Tr. 7.

3. The court of appeals affirmed. Pet. App. 27-40. It rejected petitioner's contention that the magistrate judge lacked jurisdiction to preside over the reading of the witness's testimony. *Id.* at 34-37. The court of appeals held that the district court had the authority to delegate that duty to the magistrate judge under 28 U.S.C. 636(b)(3), which provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." The court held that, under *Gomez* v. *United States*, 490 U.S. 858 (1989), the magistrate judge's presiding over a court reporter's re-reading of trial testimony was the kind of "subsidiary matter" that falls

within the additional duties clause. Pet. App. 35-36. It noted that the magistrate judge "was not required to interact or communicate with the jury" and that he "merely presided as the read-back occurred." *Id.* at 37.

ARGUMENT

Petitioner contends that the district court erred in delegating to the magistrate judge the task of presiding while the transcript of one witness's testimony was read back to the jury. Pet. 6-26. This claim is without merit.

The authority to oversee the read-back of transcribed testimony is not expressly enumerated in the Federal Magistrates Act, but falls within the "additional duties" that a magistrate judge is authorized to perform under subsection (b)(3) of the Act, 28 U.S.C. 636(b)(3). The Act authorizes district courts to assign specified duties to magistrate judges. See 28 U.S.C. 636(a), (b)(1) and (2).[2] Magistrates may also "be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3).

The availability of the district judge in this case to preside over another case in Alaska while the court reporter read back the witness's testimony to the jury in

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[2] For example, magistrate judges have all the powers of the United States Commissioners they replaced. 28 U.S.C. 636(a)(1). They also may impose conditions of release, and preside over misdemeanor trials. 28 U.S.C. 636(a)(2) and (3). Magistrate judges may hear and determine "any pretrial matter," with eight enumerated exceptions, and their pretrial orders, like those of a district judge, are subject to reversal only if "clearly erroneous or contrary to law." 28 U.S.C. 636(b)(1)(A). Magistrate judges are authorized to preside over the eight categories of pretrial matters excepted under subsection (b)(1)(A), such as motions to dismiss or quash indictments or informations or to suppress evidence, but must submit a report and recommendation for the presiding district judge's approval. 28 U.S.C. 636(b)(1)(B).

California under the auspices of the magistrate judge represents the kind of improved efficiency Congress sought to achieve by enacting the "additional duties" clause. Congress included the "additional duties" language in the original version of the statute, Pub. L. No. 90-578, § 101, 82 Stat. 1113, to allow district judges "to experiment with the assignment to magistrates of other functions in aid of the business of the courts, * * * [so that] there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal Courts." See S. Rep. No. 371, 90th Cong., 1st Sess. 26 (1967). In 1976, Congress amended the Act to clarify and further define magistrate judges' duties. Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729; see H.R. Rep. No. 1609, 94th Cong., 2d Sess. (1976); S. Rep. No. 625, 94th Cong., 2d Sess. (1976). The amendment placed the "additional duties" clause in a separate subsection to "emphasize[] that it is not restricted in any way by any other specific grant of authority to magistrates." H.R. Rep. No. 1609, *supra*, at 12. Both the House and Senate Reports on the 1976 amendment stressed that the purpose of subsection (b)(3) was to "enable[] the district courts to continue innovative experimentations in the use of this judicial officer." *Ibid.*; S. Rep. No. 625, *supra*, at 10. Among the examples of "additional duties" Congress referred to was the duty of "accept[ing] returns of jury verdicts where the trial judge is unavailable." H.R. Rep. No. 1609, *supra*, at 12. Authorizing a magistrate judge to supervise the read-back of recorded testimony, a task even less demanding of judicial skill and impartiality than receipt of a verdict, is thus just the type of subsidiary duty Congress

contemplated as falling within the "additional duties" clause.

Petitioner contends that under *Gomez* v. *United States*, 490 U.S. 858 (1989), and *Peretz* v. *United States*, 111 S. Ct. 2661 (1991), a district court is prohibited, absent the defendant's consent, from delegating any part of a felony trial, no matter how trivial, to a magistrate judge. Pet. 10-16. Those cases do not so hold. *Gomez* held that the task of conducting jury voir dire in a felony case is too important to delegate to a magistrate judge. 490 U.S. at 874-876. *Peretz* held that the prohibition announced in *Gomez* does not apply if the litigants consent. 111 S. Ct. at 2668-2669. The *Gomez* prohibition is not a blanket ban on magistrate judges' assisting at felony trial proceedings, but applies only to the "critical stages of a criminal trial." *Gomez*, 490 U.S. at 876; *Peretz*, 111 S. Ct. at 2665 (stating that *Gomez* applies to "every critical stage of a felony trial"). *Gomez* invalidated delegation of voir dire to a magistrate judge because voir dire "represents jurors' first introduction to the substantive factual and legal issues in a case," and the court must during voir dire conduct sensitive questioning of the jury venire and rule on the potential jurors' impartiality. *Gomez*, 490 U.S. at 874-875. No similar importance attached to the delegation challenged in this case.

The Ninth Circuit properly declined to extend *Gomez* to apply to the ministerial duty of presiding over the read-back of a trial witness's testimony. The re-reading of transcripts to the jury is not one of the "critical stages" of a felony trial. Unlike a judge's conduct of the voir dire in *Gomez*, a district judge's supervision of the reading back of testimony in this case could not conceivably have affected the outcome of the trial, nor does petitioner so contend. The magistrate judge's act of

observing the read-back required no decision to be made nor did it call for any exercise of judicial discretion. The district judge, not the magistrate judge, made the discretionary decision to allow the jury to hear the requested testimony, and the parties were in agreement that the entire testimony should be read. The magistrate judge's sole delegated duty was to sit in the courtroom and observe while the court reporter read the testimony to the jury. As the court of appeals noted, the magistrate judge "was not required to interact or communicate with the jury." Pet. App. 37. In fact, the district court could have provided the transcript of the witness's testimony to the jury to review in the jury room without the supervision of any judicial officer. While it was prudent for the district judge to provide official supervision for the reading aloud of the transcript, there is no reason to require that it be performed by an Article III judge.

The Ninth Circuit's decision does not conflict with any decision of any other federal court of appeals.[3] Other courts have held that magistrate judges may per-form duties that are as routine as those at issue here. See, *e.g.*, *United States* v. *Johnson*, 962 F.2d 1308, 1312 (8th Cir.), cert. denied, 113 S. Ct. 358 (1992), and 113 S. Ct. 1418 (1993) (holding that a magistrate judge was

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[3] Petitioner erroneously asserts that the decision of the court of appeals conflicts with *Olympia Hotels Corp.* v. *Johnson Wax Development Corp.*, 908 F.2d 1363 (7th Cir. 1990). Pet. 8, 25. In *Olympia Hotels*, the court of appeals applied *Gomez* in a civil case, holding that a district court may not assign a magistrate judge to conduct voir dire in a civil case over a party's objection. That holding rests on the notion that voir dire is also a critical stage of a civil case, and does not conflict with the decision below regarding the substantially less weighty task of overseeing the reading back of transcribed testimony.

authorized to accept the verdict in a felony case, because "the ministerial task of taking a verdict" is not "a critical stage of a trial" under *Gomez*); *United States* v. *Lee*, 943 F.2d 366, 369 (4th Cir. 1991) (holding that magistrate judge was authorized to ask voir dire questions prepared by district judge who was present but having voice trouble).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Other decisions in which the courts of appeals have relied on the absence of a defendant's objection to uphold delegation to a magistrate imply that, even had an objection been raised, the delegation could have been sustained under the "additional duties" clause. See, *e.g.*, *United States* v. *Arnoldt*, 947 F.2d 1120, 1124 (4th Cir. 1991) (commenting that "the delegation of authority to preside over the return of the [jury] verdict qualifies as an 'additional duty' under section 636(b)(3)"), cert. denied, 112 S. Ct. 1666 (1992); *Allen* v. *United States*, 921 F.2d 78, 80 (6th Cir.) (commenting that, where the district court prepared jury instructions and ruled on all objections, and "[t]he magistrate only performed the ministerial function of actually reading the final instructions to the jury," the magistrate's action was authorized), cert. denied, 111 S. Ct. 2896 (1991); *United States* v. *Demarrias*, 876 F.2d 674, 677 (8th Cir. 1989) (commenting that the magistrate judge acted within authorized "additional duties" in presiding over jury deliberations, relaying jury questions to district judge, communicating judge's responses to jury, and accepting verdict).